

SERVED: September 10, 1999

NTSB Order No. EA-4789

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 10th day of September, 1999

_____	)	
JANE F. GARVEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-15678
v.	)	
	)	
FRANCIS GAMBLE,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The respondent has appealed from the oral initial decision Administrative Law Judge Patrick G. Geraghty rendered in this proceeding on August 12, 1999, at the conclusion of an evidentiary hearing. By that decision, the law judge affirmed an emergency order of the Administrator suspending respondent's commercial pilot privileges and flight instructor certificate for his failure to submit to a re-examination of his qualifications to hold them.<sup>1</sup> For the reasons discussed below, the appeal will

---

<sup>1</sup>An excerpt from the hearing transcript containing the decision is attached.

be denied.<sup>2</sup>

The Administrator's June 22, 1999 Emergency Order of Suspension, which became the complaint when appealed to the Board, alleges, among other things, the following facts and circumstances concerning the respondent:

1. You are now the holder of Airline Transport Pilot Certificate No. 001432501, (AMEL), with commercial pilot privileges (ASEL) and instructor certificate (ASEL).
2. As a result of an investigation into an aircraft accident which occurred on approximately January 25, 1999 at Santa Paula Airport, Santa Paula, California, by letter dated April 29, 1999 from the FAA's Van Nuys Flight Standards District Office, you were directed to make an appointment within 10 days from receipt of this letter for a reexamination of your qualifications to be the holder of ASEL commercial pilot privileges and a flight instructor certificate (ASEL).
3. To this date, you have failed to make said appointment for reexamination referenced in Paragraph 2 above.

Respondent's failure to submit to a retest was asserted to be contrary to the Administrator's authority under 49 U.S.C. Section 44709(a) to reexamine airmen. Nothing in respondent's appeal demonstrates error in the law judge's agreement with the Administrator's position.

The facts underlying the re-examination request do not require extensive recounting here, as the law judge's decision accurately and thoroughly sets forth the evidence the parties presented. It is undisputed that the accident referred to in the complaint occurred during the landing phase of a short flight during which respondent was giving primary instrument instruction to a private pilot, a Mr. William Weiss. Mr. Weiss and the

---

<sup>2</sup>The Administrator has filed a reply opposing the appeal.

respondent gave differing accounts as to which one of them was actually operating the controls during the landing and, in effect, whose decision it was to continue an approach that Mr. Weiss, the student, who was under the hood when the aircraft entered the landing pattern, says he wanted to abort as too high.

In any event, it is undisputed that the aircraft touched down beyond the wet runway's midpoint, could not be stopped on the remaining runway, and sustained damage when it finally came to rest against a wall.

The respondent asserts that the law judge, without giving any reasons for his determination that respondent was the pilot-in-command, simply concluded that his role as instructor made him the pilot-in-command.<sup>3</sup> Although it would have been sufficient for the law judge to have so noted,<sup>4</sup> respondent's assertion does not fairly reflect the law judge's decision, which clearly references not just the respondent's responsibility for the flight as an instructor, but also the authority over the aircraft's operation that he actually exercised while Mr. Weiss

---

<sup>3</sup>The parties and the law judge all appear to assume that unless respondent were shown to be the pilot-in-command, a necessary predicate for the re-examination request would be missing. Our affirmance here should not be construed to be an endorsement of such an assumption, for we see no reason why a certificate holder's participation in the operation of an aircraft that does not rise to command responsibility could not nevertheless serve as a basis for a re-examination request.

<sup>4</sup>We recognize that there may be instances where doubt exists as to whether a flight instructor on a flight was in fact providing flight instruction. See, e.g., Administrator v. Strobel, NTSB Order EA-4384 (1995). This is not such a case. The respondent acknowledged that "[w]e went up for the purpose of primary instrument instruction" (Tr. at 63).

was at the controls. In any event, respondent has identified no reason to disturb the law judge's determination that respondent was the pilot-in-command of the flight, without regard to the conflicting testimony as to whether the respondent actually manipulated the aircraft's flight controls during the landing itself.<sup>5</sup>

Respondent also argues that the law judge erred because he affirmed a re-examination request when no showing had been made that his qualifications were deficient. This argument simply ignores unequivocal, longstanding Board precedent, carefully explained by the law judge to the respondent and his counsel, that the issue in a case of this type is not whether respondent in fact lacks qualification to hold his ATP or flight instructor certificates, but whether the incident which gave rise to the request could be attributable to a lack of airman competency:

As the law judge correctly recognized, Board review of the Administrator's re-examination requests involves an extremely narrow inquiry; namely, whether the request, objectively viewed, is reasonable. In this connection, our decision in *Administrator v. Ringer*, 3 NTSB 3948, 3949 (1981), described the limited scope of our role with respect to a re-examination request by explaining that the availability of review here:

"does not mean that the law judge or the Board may invalidate a re-examination request simply because some factor, or factors, other than pilot competence may have been responsible, in whole or part, for the incident or accident underlying it. It means only that the Administrator, to have his request upheld, must demonstrate a reasonable basis for believing that pilot competence could have been a factor. Where such a basis has been shown, it is of no legal significance that the airmen involved may differ with

---

<sup>5</sup>On this matter, respondent testified only that "[a]nd right before the end of the runway I went ahead and applied brakes..." (Tr. at 65).

the Administrator's judgment as to the necessity for a re-examination."<sup>6</sup>

Respondent does not argue that an off-runway landing such as occurred here could not be caused by a lack of pilot competence, and he makes no argument that the standard we have for decades followed in reviewing re-examination challenges is or should be deemed inapplicable in this instance.<sup>7</sup> In such circumstances, respondent's appeal from a decision which requires him to do no more than to comply with a re-examination request that he has not shown to be unreasonable must be rejected.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondent's appeal is denied; and
2. The initial decision and the emergency order of suspension are affirmed.<sup>8</sup>

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

---

<sup>6</sup>Administrator v. Wang, 7 NTSB 752 (1991).

<sup>7</sup>Our review of the record satisfies us that the law judge did not inappropriately limit the respondent either in his presentation of evidence or in his ability to conduct cross examination. Respondent's contrary view stems from his disagreements with the law judge's refusal to allow respondent to introduce or explore matters clearly beyond the scope of the issues relevant to the "extremely narrow inquiry" before him.

<sup>8</sup>The duration of the emergency suspension is, of course, dependent upon respondent's successful completion of the retest he has thus far refused to take.